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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines	)))))	CI Docket No. 95-6

To: The Commission

COMMENTS

Dennis C. Brown and Robert H. Schwaninger, Jr. d/b/a Brown and Schwaninger respectfully submits its comments in regard to the above-captioned matter. Brown and Schwaninger suggests that the Commission might take the opportunity to review its intended purpose behind levying forfeitures. In support of its position, Brown and Schwaninger shows the following:

The Commission states that adopting the forfeiture schedule would "include comparable treatment of similarly situated offenders and clearer guidance to the public regarding the forfeitures that can be expected in response to specific violations." However, if the Commission adopted the guidelines it would "remain free to exercise discretion in specific cases." The Commission claimed that "adopting such standards also would increase our administrative efficiency in determining the appropriate range of forfeitures for various offenses. . ."

The Commission apparently does not recognize the contradiction within its Notice of Proposed Rule Making (NPRM). Adopting a guideline from which Commission

personnel may depart at will does not provide clear guidance to the public regarding the forfeiture that might be expected for specific violations. It also does not provide for administrative efficiency; there is no clear articulation as to what circumstances would justify departure from the guidelines.

Brown and Schwaninger respectfully submits that the Commission cannot both exercise discretion and achieve administrative efficiencies in the manner proposed. The exercise of discretion eliminates any gained administrative efficiency anticipated from loosely dictated guidelines. The availability, to Commission staff, of discretion invites litigation, rather than discourages it. Violators will petition the Commission to depart from its standard, claiming that the circumstances behind a specific violation warrant the use of discretion to reduce forfeiture. The Commission, then, will be forced to evaluate each case and justify its determination to adhere to or depart from the standard. Administrative efficiency will thus be lost.

The Commission should consider the facts of each case and set the level of forfeiture based on an evaluation of the facts and on precedent. To be certain, there is merit to providing regulatees with certainty as to the consequences of their behavior, but there is no merit to adopting a rule which may be applied strictly, flexibly, or not at all in a particular case. If the Commission desires to enforce a policy, it should adopt a rule and apply it similarly to all similarly situated persons. If the Commission is not prepared to adopt a rule and apply it similarly to all similarly situated persons, it should do

nothing. Brown and Schwaninger respectfully suggests that the Commission consider whether the proposed approach of adopting a flexible guideline rather than a rule will achieve the desired administrative efficiencies, or whether it will act instead as a lightning rod for litigation.

The Commission's proposed forfeiture levels seem to be primarily based on calculations between the ceilings created by Congress and the type of radio service provided by the violator. It would appear that the Commission arrived at the proposed forfeiture levels using certain assumptions. The first assumption is that certain classes of operators have, by the nature of the service provider, greater resources to pay forfeitures than others. The second assumption is that the harm created by a violation of a rule by a broadcaster or a common carrier is more egregious than one created by a private radio entity. We respectfully suggest that both assumptions are fallacious and neither should be controlling.

The Commission is well aware of numerous of its regulatees which are large corporations and which are licensed to operate private radio facilities. Utility companies, manufacturing entities, etc. are often multi-billion dollar corporations. In contrast, the Commission is further aware of small broadcasting entities with extremely limited resources and small common carriers which hold licenses for only a few facilities. Accordingly, any creation of standards for forfeitures which carries with it a presumption that all broadcasters or all common carriers are better positioned to pay a fine at a level

which is many times higher than the fine would be for a similar act by a private radio licensee is simply not supportable.

Nor may the Commission reasonably find that the harm to be visited on its processes or on the operation of telecommunications facilities or on the public is inherently greater if the source of the harm is one class of carrier versus another. A private radio licensee is capable of disrupting the operation of sensitive public safety activities and of television reception. A private radio licensee can act in a manner which might destroy the business of a competing entity. And a private radio licensee can engage in perjury and misrepresentation before the Commission which is every bit as heinous as any perpetrated by a common carrier or a broadcast entity.

Similarly, a broadcaster and a common carrier can each engage in relatively minor violations, the effect of which is practically harmless to the agency or to any member of the public. Yet, following discovery of a minor violation, the common carrier might be subject to huge fines arising out of the singular fact that the operator chose to be a common carrier. This threat of arbitrarily high forfeitures being leveled against relatively small operators is increased by the recent creation of the Commercial Mobile Radio Service which would appear to increase the number of operators who might be subject to a sudden change in class.

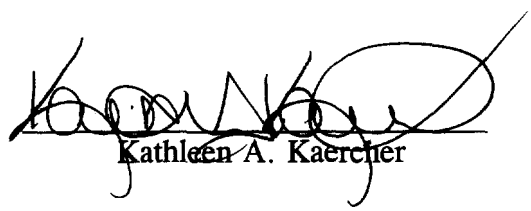
We respectfully suggest that all forfeitures, regardless of the type of service provided by the operator, should be based solely on the level of injury to the agency's processes and to the public interest. Employing its great discretion in this area, the agency should observe the Congressionally-set ceilings and nothing more, applying forfeitures based solely on the level of harm created by the violations at some reasonable point below such ceilings. Then, if as the Commission proposes, the violator can provide a demonstration of its inability to pay the forfeiture imposed, the amount might be adjusted downward. Additionally, if the Commission wishes to increase the punitive effects of its forfeiture policy, it would employ its discretion to adjust a forfeiture upward to reflect the enormous assets of some telecommunications concerns. These adjustments would be based on the individual identity of the violating party and not on arbitrary inclusion within a class of operators.

We support the Commission's efforts to enforce its rules and to discover means of assuring that regulatees receive fair and equitable treatment before the agency. However, we respectfully suggest that the method proposed results in a system which reflects a mechanical approach that cannot be supported by information contained within the Commission's records and which does not reflect the realities of the market. We further respectfully suggest that the Commission's primary focus should be on the level of injury or harm caused by the improper activity, and not on an arbitrary classification of operators.

Conclusion

For all the foregoing reasons, Brown and Schwaninger respectfully requests that the Commission reconsider adopting the proposed standard of forfeitures in view of its determination of whether the adoption of the guidelines will achieve the desired results.

Respectfully submitted,
BROWN AND SCHWANINGER

By 
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